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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO JOAQUIN MENDOZA,

Defendant and Appellant.

G054952

(Super. Ct. No. 15CF0617)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Sergio Joaquin Mendoza guilty of felony false imprisonment, misdemeanor false imprisonment, domestic battery, including a great bodily injury enhancement, and making criminal threats. He appeals from the resulting judgment after the trial court sentenced him to a total of nine years, eight months in prison. From his perspective, there was insufficient evidence to support his conviction on one of the charged counts of making criminal threats, and the trial court erred in denying him probation, imposing certain prison terms and including certain amounts in the restitution order. We find no merit in any of these contentions and affirm the judgment.

FACTS

The events leading to defendant's arrest took place while he was in a relationship with his then girlfriend, Isela Nunez. They had been together for some time, but as Nunez testified at trial, defendant grew increasingly controlling and abusive toward her over time. He would force her to go places with him, threatening that if she ever left he would go looking for her and she would "pay for that."

Defendant's actions peaked one weekend while Nunez was staying with him at his grandmother's apartment. For an entire week, instead of letting her stay home while he went to work, defendant forced Nunez to accompany him. He threatened she "would pay" if she refused and said "he would continue hurting [her]."

Each day, Nunez rode in the front passenger seat of defendant's car, looking down the entire time because he did not want her to know their location. When they approached within a block or two of the construction site where defendant was working, he forced her to lay down in the back seat of the car. Upon arrival, defendant locked the car doors, leaving Nunez inside, and told her she could not move or ask for help from anyone. Nunez had no access to food, water or a restroom during defendant's eight-hour work shift, except during his lunch break when he would purchase food for her and take her to a place she could use the restroom.

Throughout the week, defendant repeatedly told Nunez that she “could not leave him, and if [she] dared do it he would find [her] and hurt [her] badly.” In the evenings, he would drink beer and use what Nunez described as a white powdery drug; it made him more aggressive.

On the Sunday evening at the end of that week, Nunez told defendant she wanted to leave. He responded he would only let her do so if she allowed him “to write something on [her].” Feeling she had no choice, Nunez allowed defendant “to do what he wanted.” He carved his name on her chest with a razor blade, later tracing around the carving with a pen. Then he turned the blade on himself, carving on his own chest, “Isela, please forgive me. I love you.”

Although defendant covered Nunez’s mouth to prevent anyone from hearing her screams, eventually his grandmother and uncle heard and entered the room. The uncle told defendant he had to leave, but said Nunez could stay. Defendant would not allow that, so he physically forced her to leave with him despite her protests.

Defendant drove himself and Nunez to the parking lot of a nearby Target store where he parked and locked the doors. He persisted in trying to hold her hand, but Nunez would not let him. Her rejection frustrated him, leading him to grab her arm and twist it so hard she heard it “pop.” Whenever Nunez would try to sleep, he would wake her up.

In the early morning hours of the next day, defendant drove to the parking lot of a different shopping center and parked the car. He tried to kiss Nunez, but when she refused, the physical violence continued. Defendant bit her on the lip, grabbed her neck, hit her face with a closed fist, and slammed his head against her forehead.

With defendant distracted looking at his phone, Nunez saw an opportunity to escape. She pushed open the passenger door, which defendant had forgotten to lock, and climbed out. He quickly got out of the car and attempted to force her back into it.

However, she managed to resist and get away. She ran to an adjacent store in which she found someone to call the police.

An amended information charged defendant with three counts of kidnapping (Pen. Code, § 207, subd. (a); counts 1, 2, & 3),¹ two counts of domestic battery with corporal injury (§ 273.5, subd. (a); counts 4 & 5), and three counts of issuing criminal threats (§ 422, subd. (a); counts 6, 7, & 8). With respect to the first domestic battery count, it was further alleged that defendant used a dangerous or deadly weapon, a razor blade (§ 12022, subd. (b)). As to the second domestic battery count, it was further alleged that defendant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)).

At trial, Nunez testified, as did two police officers. The sole defense witness was defendant's grandmother.

A jury found defendant guilty of one of the three charged kidnappings. As to one of the other two, it found him guilty of the lesser included offense of misdemeanor false imprisonment, and as to the other it found him guilty of felony false imprisonment (§§ 236, 237). The jury also returned guilty verdicts on the domestic battery charges and two of the three criminal threat charges. Regarding the enhancements, it found the deadly weapon enhancement not true, but the great bodily injury enhancement true.

The trial court found defendant presumptively ineligible for probation under section 103, subdivisions (e)(1), (2) and (3), and ultimately denied probation. It sentenced defendant to a total of nine years, eight months in prison. This included: the upper term of four years on count 5, which the court deemed the primary count, with an additional consecutive three years for the great bodily injury enhancement; consecutive terms of one year, eight months on count 3, and one year on count 4; and a concurrent term of two years on count 2. It also included two years for each of the two criminal

¹ All further statutory references are to the Penal Code unless otherwise indicated.

threat convictions, which the court stayed pursuant to section 654, and one year for the misdemeanor false imprisonment, which the court also stayed.

DISCUSSION

Defendant's appeal is limited to challenging the sufficiency of the evidence supporting his conviction for one of the counts of making criminal threats and a variety of sentencing matters. As for the former, we find ample evidence in the record to support the conviction. And as to the latter, defendant fails to demonstrate error in the trial court's denial of probation, prison term imposition or restitution order.

Sufficiency of the evidence

Defendant argues there was insufficient evidence to convict him on the charge of making criminal threats the night he carved his name into Nunez's chest, left his grandmother's house and spent time in the Target parking lot (count 7). He claims the only evidence was tied to the following morning when he moved the car to a different shopping center parking lot and Nunez escaped, which resulted in conviction on a separate charge (count 8). We disagree.

"Our role when reviewing the sufficiency of the evidence is to evaluate the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Ramos* (2016) 244 Cal.App.4th 99, 104.) We view the record in the light most favorable to the judgment, resolving all conflicts and indulging all reasonable inferences in support of the judgment. If there is more than one inference which may reasonably be drawn from the evidence, we accept the inference which supports the judgment. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) In doing so, we do not substitute our judgment for that of the trier of fact with respect to the credibility of witnesses. (*Ibid.*) "A reversal for insufficient evidence "is unwarranted unless it

appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’” the jury’s verdict. [Citation.]’ [Citation.]” (*Ibid.*)

To prove the making of a criminal threat under section 422, the prosecution must establish: ““(1) that the defendant “willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person[;]” (2) that the defendant made the threat “with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out[;]” (3) that the threat—which may be “made verbally, . . . was “on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat[;]” (4) that the threat actually caused the person threatened “to be in sustained fear for his or her own safety or for his or her immediate family’s safety[;]” and (5) that the threatened person’s fear was “reasonabl[e]” under the circumstances.’ [Citations.]” (*In re George T.* (2004) 33 Cal.4th 620, 630-631.)

Here, Nunez testified that after she told defendant she wanted to leave his grandmother’s house, he told her the only way he would let her leave was if he first carved his name into her chest. He had a razor blade with him and said he wanted to do it so that other men would see the name and consequently not want to be with her. Nunez let him do what he threatened to do because she wanted nothing more than to leave the abusive situation. These circumstances are sufficient to uphold defendant’s conviction for making criminal threats on the day in question. (See § 12022.7, subd. (f) [““[G]reat bodily injury’ means a significant or substantial physical injury”]; *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047 [“An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of ‘great bodily injury’”].)

Sentencing

Defendant challenges multiple aspects of his sentence. Concerning the prison sentence, he contends the trial court (1) erroneously concluded he was presumptively ineligible for probation; (2) unwarrantedly failed to stay the two-year term imposed for the felony false imprisonment conviction; and (3) erred in imposing the upper term sentence on the domestic battery count which included a great bodily injury enhancement. With respect to the restitution, he argues the court improperly ordered he pay restitution to a person who was not a victim of any of the crimes for which he was convicted. All of these arguments fail.

1. Denial of probation

Section 1203, subdivision (e) sets forth categories of persons to whom probation shall not be granted “[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation[.]” The trial court indicated defendant was presumptively ineligible for probation pursuant to three of those categories. Defendant claims this was error because neither the jury nor the court made certain necessary express findings related to the categories. We find no error.

“‘The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation . . . [and] whether a given case is ‘unusual’ and entitles the defendant to probation in the interests of justice. [Citation.]” (*People v. Nuno* (2018) 26 Cal.App.5th 43, 49.) Nevertheless, “[w]e independently evaluate whether the . . . court properly found [defendant] presumptively ineligible for probation. [Citations.]” (*Id.* at p. 50.)

Here, the court relied on three of the statutory categories to conclude defendant was presumptively ineligible for probation. The first concerns any person convicted of, inter alia, kidnapping who was unlawfully armed with a deadly weapon “at the time of the perpetration of the crime or his or her arrest[.]” (§ 1203, subd. (e)(1).) The second encompasses “[a]ny person who used, or attempted to use, a deadly weapon

upon a human being in connection with the perpetration of [a] crime of which he or she [was] convicted.” (§ 1203, subd. (e)(2).) The third applies to “[a]ny person who willfully inflicted great bodily injury . . . in the perpetration of the crime of which he or she has been convicted.” (§ 1203, subd. (e)(3).)

We begin with the latter because it is determinative of the issue defendant raises. The jury found true that defendant “personally inflicted great bodily injury” on Nunez during the commission of the domestic battery for which he was convicted. Such finding did not include a specific intent component, a characteristic which defendant correctly identifies as being required to be presumptively ineligible for probation under section 1203, subdivision (e)(3). (See *People v. Lewis* (2004) 120 Cal.App.4th 837, 853.) But a court making a determination concerning probation is not limited by the jury’s findings. (*Ibid.*; *People v. Brewster* (1969) 276 Cal.App.2d 750, 754 [“It is the function of the court to determine the facts relevant to the fixing of probation and, in the exercise of its discretion, to determine whether probation shall be granted or denied”].)

Here, there was a plethora of evidence concerning defendant’s state of mind. Nunez testified defendant said he would not let her leave his grandmother’s house without him unless she allowed him “to write something on [her].” She begrudgingly succumbed to his desires, and he proceeded to carve his first name into the skin of her chest with a “construction blade” he had in his possession. Nunez also testified that later that night while parked in the Target parking lot, defendant twisted her arm so hard she heard and felt it “pop”—an injury for which she was treated at a hospital. She described him as “very aggressive constantly,” hitting her in the face with his fist, biting her lip, head butting her, and squeezing her neck with his hands around her throat.

The willfulness to inflict great bodily injury was apparent. And in absence of evidence to the contrary, we presume the trial court followed the law and made the factual findings necessary to its determination. (See *People v. Stowell* (2003) 31 Cal.4th 1107, 1114; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914.)

Defendant's assertions fail on an additional level. Even if he established the trial court erred in relation to its finding that he was ineligible for probation, we would not remand because doing so would be an idle act. The record reflects that in addition to finding defendant presumptively ineligible for probation, the court denied probation based on multiple aggravating factors. (See *People v. Black* (2007) 41 Cal.4th 799, 817 [aggravating factor "may be used both to deny probation and to support imposition of an upper term sentence"].) It characterized defendant as "a dangerous individual," and "a violent and a controlling person." Additionally, the court found the nature, seriousness, and circumstances of the crime compared to other instances of the same crime to be "more serious." Given the court's identification of these aggravating factors, and its resulting conclusion that "there would not be a likelihood . . . defendant would succeed upon a grant of probation[,]" there is no reasonable possibility the court would have found defendant suitable for probation. (See *People v. Bringham* (1945) 72 Cal.App.2d 1, 8 [affirming denial of probation because trial court provided other unchallenged reasons for denial].)

2. Stay of sentence pursuant to section 654

The trial court imposed a two-year concurrent prison term for defendant's felony false imprisonment conviction. Defendant asserts the court should have stayed that sentence, pursuant to section 654, because his "imprisonment of [Nunez] by force or fear cannot be divisible from his use of force and fear (corporal injury and criminal threats) against her." The argument lacks merit.

"Section 654, subdivision (a) provides that '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' ""Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all

of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.”” [Citation.]” (*People v. Jackson* (2016) 1 Cal.5th 269, 353-354.) ““On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]”” (*People v. Pinon* (2016) 6 Cal.App.5th 956, 968 (*Pinon*).)

““The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.] The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to support them.’ [Citation.]” (*Pinon, supra*, 6 Cal.App.5th at p. 968.)

Here, substantial evidence supports the trial court’s implicit determination that defendant bore separate intents or objectives when he battered and falsely imprisoned Nunez on the night he was kicked out of his grandmother’s house. The domestic battery (count 4) took place at the house when defendant carved his name into Nunez’s chest. She testified he did this so other men would know that she belonged to him—an act of dominance. After his grandmother and uncle heard and saw what occurred, the uncle told defendant he had to leave. But defendant refused to leave without Nunez, despite her expressed desire to stay.

From this evidence, the trial court could reasonably infer that it was only after defendant completed the domestic battery that he formulated an intent to take Nunez against her will. Further, it could reasonably infer that defendant harbored two separate intents or objectives—showing his dominance in their relationship, in the first instance, and preventing Nunez from escaping, in the second instance. Accordingly, we must

uphold the trial court's decision not to stay the prison term for defendant's felony false imprisonment conviction. (See *People v. Roth* (1964) 228 Cal.App.2d 522, 535 [affirming decision to sentence for both offenses when judge reasonably could have inferred that intent to commit one was not formed until other had been accomplished]; *People v. Harrison* (1989) 48 Cal.3d 321, 335 ["It is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible"].)

3. *Upper term sentence*

Defendant claims the trial court's upper term sentence on the principle count of domestic battery may not be maintained because the only aggravating factor on which it was based is what he contends was the improper concurrent sentence on the felony false imprisonment charge. Our rejection of his challenge to the latter sentence under section 654 renders his upper term argument baseless. Further, the record reveals the court provided multiple other reasons for selecting the upper term, none of which defendant challenges in form or substance. Defendant has not demonstrated error. (§ 1170, subd. (b) ["The court shall select the term which, in the court's discretion, best serves the interests of justice"]; *People v. Jones* (2009) 178 Cal.App.4th 853, 863, fn. 7 ["Only a single aggravating factor is necessary to make it lawful for the trial court to impose an aggravated prison term"].)

4. *Restitution*

Based on a communication from the California Victim Compensation Board, the parties stipulated below to a roughly \$6,000 restitution order which the trial court included in its judgment. Defendant argues the order was unlawful because \$810 of it was unattributable to Nunez, the sole victim of his crimes. On the record before us, we find defendant has not demonstrated error.

Section 1202.4 declares "the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive

restitution directly from a defendant convicted of that crime.” (*Id.*, subd. (a)(1).) A court has broad discretion in setting the specific amount of restitution. (*People v. Baker* (2005) 126 Cal.App.4th 463, 470.) In doing so it may consider a variety of relevant factors, including, inter alia, “the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime.” (§ 1202.4, subd. (d).) Those losses may include both pecuniary ones and intangible ones (e.g. psychological harm). (*Ibid.*)

“If, as a result of the defendant’s conduct, the [California] Restitution Fund has provided assistance to or on behalf of a victim *or derivative victim* pursuant to [Government Code section 13950 et seq.], the amount of assistance provided shall be presumed to be a direct result of the defendant’s criminal conduct and shall be included in the amount of the restitution ordered.” (§ 1202.4, subd. (f)(4)(A), italics added.) A derivative victim is anyone “who sustains pecuniary loss as a result of injury or death to a victim.” (Govt. Code, § 13951, subd. (c).)

Here, the prosecutor provided the court and defense counsel with paperwork from the California Victim Compensation Board reflecting the amount of assistance provided by the California Restitution Fund to two persons, along with the category of “services for which payment was made.” (§ 1202.4, subd. (f)(4)(B).) Defense counsel stipulated to the amounts, believing them to be “accurate accounts of the expenses.” With nothing to overcome the presumption that the amounts specified were “a direct result of the defendant’s criminal conduct,” the trial court followed the statutory mandate that they be included in the restitution ordered. (§ 1202.4, subd. (f)(4)(A).)

Defendant’s focus on Nunez as “the single victim” of his crimes is myopic. When it comes to restitution based on assistance provided by the California Restitution Fund, direct victims are only one part of the equation. Assistance provided to “derivative victims” must also be included unless the statutory presumption of relation to the

defendant's criminal conduct is rebutted. (§ 1202.4, subd. (f)(4)(A).) Defendant offers nothing in that vein, and he, likewise, did not do so below. He, therefore, fails to demonstrate error.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.